

IN THE MATTER OF THE ARBITRATION BETWEEN

THE MINNEAPOLIS
FEDERATION OF TEACHERS,

Union,

and

SPECIAL SCHOOL DISTRICT
NO. 1 (MINNEAPOLIS),

Employer.

MINNESOTA BUREAU OF
MEDIATION SERVICES
CASE NO. 06-PA-0971

DECISION AND AWARD
OF
ARBITRATOR

APPEARANCES

For the Union:

Debra M. Corhouse
Jess Anna Glover
Christina L. Clark
Attorneys
Education Minnesota
41 Sherburne Avenue
St. Paul, MN 55103-2196

For the Employer:

Kevin J. Rupp
Ratwik, Roszak & Maloney, P.A.
Attorneys at Law
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402

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11 JUL 07 11:05 On March 9, 2007, and on April 19, 2007, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by issuing a notice of deficiency to the grievant, Karen B. Moe-Cain, and suspending her without pay from

January 9, 2006, through the end of the school year, in June 2006. The last of post-hearing briefs was received by the arbitrator on May 20, 2007.

FACTS

The Employer operates the public schools in Minneapolis, Minnesota. The Union is the collective bargaining representative of the Teachers who teach in the Employer's schools.

The grievant is licensed as a school Teacher by the Minnesota Department of Education, with certifications in elementary education for kindergarten through sixth grade and Art for kindergarten through twelfth grade. She also holds several special education certifications. She has been employed by the Employer for eighteen years.

During the 2005-2006 school year, the grievant taught as an Art specialist at a Montessori school operated by the Employer, the Seward Elementary School ("Seward"). That year was her first year teaching at Seward.

On January 9, 2006, Laurie A. Steiger, an Associate in the Employer's Employee Relations Department, issued the following Notice of Deficiency and Suspension to the grievant:

This is a Notice of Deficiency and Unpaid Suspension for engaging in inappropriate conduct. Your suspension will be served from 1/9/06 to the end of this school year. The reasons for this action are stated below:

- On 12/5/05, it was reported that you put a paint tray under a 4th grade student's hand and hit your hand (or fist) down hard on her hand causing a red mark and swelling on her hand.
- Although you denied doing this, there was credible testimony from seven witnesses that stated that you

did do this. The witness testimony is very consistent in detail and was gathered soon after the incident (the same day within an hour or two). Additionally it was gathered from a diverse group of students who were in a position to observe what occurred. Some of the students are not friends of the student who was hit and have no reason to fabricate what occurred.

- After your Loudermill meeting additional testimony was gathered and some students were questioned a second time. Again their testimony was consistent and credible. Students who were in a position to observe what occurred reported that her hand turned red right after you hit it.

These actions are very disturbing because you denied touching the student or hitting her hand. It is also very disturbing because the student's hand was injured.

At the Loudermill meeting you admitted that you were angry and picked up the paint tray and handed it to the student at the beginning of the class. You also said that you kept her after class and that she was probably mad at you and made the incident up. You said that after class -- before you released her to go -- she slammed the paint tray down on the table and possibly that is what made her hand red. However this latter statement was not in the written statement that you initially provided on 12/5/05. It is odd that you would have omitted this from your written statement if this really occurred.

Finally students who were interviewed reported that you yelled at students during class for no reason.

Expectations: Based upon the issues and concerns noted above, if you return to school next year, you must meet the following expectations:

- Handling Student Behavior/Issues: As a teacher, you are held to a higher standard of conduct than your students. You must communicate and respond appropriately at all times with them. This is true even when your students are not being appropriate. You may not be physically aggressive with students or take your anger out on them. You may not yell at them.
- Non-retaliation: Please note: The District takes this matter very seriously. You should not discuss this incident with students or take any negative actions against them for having reported what they observed.

Please note: This is a very serious matter. If you engage in similar behavior in the future or fail to abide by these expectations you will be subject to additional discipline up to and including discharge.

The 860 students at Seward are grouped in classrooms, and each group receives most of its instruction from a regular classroom Teacher. Students also receive instruction in special subjects, such as Art and Music, from specialist Teachers. The grievant was the Art specialist at Seward during the 2005-06 school year; she taught in a special classroom equipped for Art instruction (the "Art Room").

As the Notice of Deficiency states, the events that led to the grievant's discipline occurred on December 5, 2005. The allegations that form the basis for her discipline concern a group of about thirty-two students in a combined fourth and fifth grade class. Their regular classroom Teacher was Mary Lee Gudmundson, and hereafter, I may refer to this class as the "Gudmundson Class." The grievant testified that the students in that class were upset that their previous Art Teacher had not returned. Their behavior was unpredictable and they were not accepting of her. They routinely questioned her about the reason they were working on projects she selected. Her photograph, which was placed on the bulletin board in the Art Room had been defaced.

On December 5, 2005, the students in the Gudmundson class came to the Art Room at 10:40 a.m., as they did about once every six school days. The Art Room has six large tables where students sit as they receive instruction and work on art projects. The grievant did not assign students to particular seats, except as she thought necessary to keep students attentive.

The grievant had taken sick leave in mid-November, 2005, and her classes were taught by a substitute Teacher until her return in early December. On December 5, she taught the Gudmundson Class for the first time since her return from sick leave. After taking roll call, she spoke to the class about an incident that had occurred while she was on leave. When she returned from leave, Seward's Principal, Marilyn R. Levine, told her that a student from the Gudmundson Class had made a dagger-like weapon and said that he was going to stab the grievant with it. When the grievant took roll call, she found that that student was not in the class. She told the students that "if you know of a weapon and it is going to be used, you have to speak up." The grievant testified that a student responded that they did not want to be "snitches." Levine urged the grievant to press juvenile charges against the student who had threatened her, and the student was transferred to another school.

The grievant had several projects planned for the Gudmundson Class the morning of December 5, including instruction in the use of acrylic paint and the painting of sculptures the students had made previously. She passed out styrofoam trays, about nine inches long and seven inches wide, for the students to use in mixing paints. After instructing them in the use of acrylics, she began the sculpture painting project, but many students were unable to locate the sculptures they had made. At about 11:10 a.m., half-way through the period, the grievant asked the students if they wanted to continue with the sculpture painting. Because they showed

little enthusiasm, the grievant decided to end that project and begin a drawing project she had planned.

The grievant testified that when she began to pick up the styrofoam paint trays, the following exchange occurred between her and a fourth grade student, whom I refer to hereafter as "AB" to preserve her anonymity. As the grievant was retrieving the tray used by AB, the grievant saw that the tray had small holes punched in the styrofoam. The grievant said, "who's been poking holes in the tray?" AB said, "I have," and put her head down. The grievant said, "well, I won't be needing this; you can have it." The grievant left the tray with AB. She testified that she was sorry she had spoken in this manner to AB because her last remark was "snide" and "hurt her feelings."

The grievant testified that she had previously had difficulty keeping AB attentive, and for that reason had required AB to sit at a table in the front of the classroom. According to the grievant, AB was upset with the grievant because of the required seating assignment.

Gudmundson testified that when the Art class ended at 11:40 a.m. on December 5, 2005, she went to the Art Room to escort her students to the lunch room, which is about thirty feet from the Art Room. As she did so, the grievant handed her a note. Gudmundson could not recall the contents of the note as she testified, but it was presented in evidence. It was addressed to Gudmundson, and it related that the students had been disruptive of the class, making tapping sounds, and that the acrylic paint lesson had been abandoned for a tree drawing

lesson at about 11:05 a.m. Gudmundson testified that her students seemed upset when she met them after the Art class, but that she did not remember if they said why they were upset. After Gudmundson escorted her students to the lunch room, she also went to lunch. When the students finished their lunch, they went to the play area at the front of the school building for recess. At the end of recess, at about 12:20 p.m., Gudmundson met them at the front door to escort them to her classroom.

Gudmundson testified that, as she was escorting her students to her classroom, AB asked her to look at her hand and said that the grievant had hit her on the hand. Other students, who were gathered around them, said that AB had not been listening, that she had poked holes in a paint tray with a pencil and that the grievant "got really mad" and said "that was mine, now it's yours" and hit AB on the hand. Gudmundson testified that she looked at AB's hand and that it was "red and a bit puffy" with a mark about the size of a half dollar or a silver dollar. The school nurse was not available at the time; at the suggestion of the students, snow was gathered in a plastic bag, and the bag was applied to AB's hand. Gudmundson testified that she then informed Levine about the allegations made by AB and the other students. She could not recall whether she sent the students to Levine's office at that time.

Levine testified that, when she heard about the incident from Gudmundson, she telephoned Emma Hixson, the Employer's Executive Director of Employee Relations, and that, upon Hixson's advice, she began an investigation. Starting at about

1:00 p.m. on December 5, she and Michelle Tuttle, Assistant Principal at Seward, interviewed and took statements from AB and several other students, meeting with each student alone, out of the presence of the others. Levine observed AB's hand at about 1:15 p.m., and she testified that it did not appear red. At about 2:00 p.m., she met with the grievant, telling her that students had said that she had hit a child, AB. Levine testified that the grievant denied the accusation and was very upset. Levine asked the grievant to write a statement, which she did. On the following day, December 6, Levine took a statement from Gudmundson.

Levine sent the statements taken from the six students, from the grievant and from Gudmundson to Hixson, and Hixson assigned Steiger to continue the investigation.

On December 14, 2005, Steiger, the grievant, Levine, and two Business Agents for the Union, Michael Leiter and Audrey McCoy, attended a Loudermill hearing. Levine testified that, at that hearing, the grievant denied having hit AB on the hand and said that she saw AB hit herself on the hand.

Below, I summarize Steiger's testimony about the Loudermill hearing. The grievant said that she had kept AB in the Art Room for a short time after class because she was talking during class to a boy who was in a "time-out." Steiger's notes about the Loudermill hearing recount that the grievant said she had kept AB back "a couple of minutes - after 3 or 4 minutes she stood up & slammed tray on table & walked out - she was mad -- not hard not sure how hard -- heard tray on table and saw her stomp out." Steiger testified that the

grievant said that AB had slammed the paint tray down on the table and had hurt her hand that way. The grievant was asked if she could think of a reason why the students might be mad at her and be making up the accusation against her. On December 15, the grievant telephoned Steiger and said that it was possible that the students were upset because the boy who had fashioned a dagger-like weapon and threatened to stab the grievant several weeks before had been transferred to another school.

At the hearing before me, the grievant testified 1) that at the end of the class period, when AB was required to stay in the Art Room for several minutes, she asked why, 2) that the grievant told her she was being kept in the room because she had not been participating in the class and because she had been talking to the student in time-out, 3) that the grievant then excused her as she was washing trays in the sink, 4) that she heard a sound and looked around, 5) that AB was holding her left hand with her right hand and 6) that AB left.

McCoy did not testify, but her notes about the Loudermill hearing were presented in evidence, as were Leiter's notes. Leiter did testify. In describing the Loudermill hearing, Leiter's testimony, his notes and McCoy's notes, though varying slightly in detail, were generally consistent with the description given in Steiger's testimony and notes.

Levine testified that after the Loudermill hearing of December 14, she decided to do further investigation. On December 19, she and Steiger reinterviewed four students and interviewed one other student for the first time, meeting with

each student alone, out of the presence of the others. With the taking of those statements, the investigation was complete, except for consideration of the grievant's record and of the appropriate discipline.

Steiger testified that, after reviewing the evidence gathered during the investigation, she concluded that the grievant hit AB on the hand during the Art class on December 5. When weighing the evidence, she rejected the grievant's denial because she credited the accounts of AB and the other students. She and Hixson conferred about the appropriate discipline, and after doing so, Steiger recommended the long suspension imposed by the Notice of Deficiency. Steiger testified that, before making that recommendation, she considered the grievant's lack of previous discipline, but she thought that the grievant when hitting AB was acting "punitively." Steiger testified that she reviewed other cases of discipline for similar conduct to determine a standard to apply in the grievant's case. She also testified that, when she reviewed those cases, she considered as an ameliorating factor the fact that some of the accused Teachers had admitted the conduct they were charged with and had apologized, whereas the grievant had denied the conduct charged. The evidence shows that the grievant, because of the suspension, the grievant lost ninety-eight days of pay at \$300.90 per day.

DECISION

The Union argues 1) that the investigation conducted by the Employer was not fair and objective, 2) that the allegations made in the Notice of Deficiency are not supported by substantial

evidence and 3) that the discipline imposed on the grievant was disproportionately severe when compared to discipline imposed on other employees in similar circumstances. The Employer rejects these arguments, thus raising the primary issues for resolution.

The Investigation. The Union argues that Steiger pre-judged the grievant to be culpable before completion of the investigation. It urges that such a pre-judgment is evidenced by Steiger's testimony that the grievant's denial of the accusation showed her to be dishonest and uncooperative. The Union urges that this testimony indicates that the investigation was not fair and objective.

As I interpret Steiger's testimony, she did not use her eventual conclusion about the grievant's veracity to pre-judge the issue. Rather, she completed the investigation, then made her determination about the issue of fact -- whether the grievant hit AB -- and then used her conclusion about the grievant's veracity in deciding what discipline to impose. This sequence does not describe an investigation that was unfair.

The Union also makes the following argument that the investigation was not fair. The grievant's statement given to Levine the afternoon of December 5 did not include an explanation she gave later at the Loudermill hearing -- that AB may have struck her own hand as she left the Art Room. Steiger testified that she thought that the grievant's failure to include that explanation in her statement was an inconsistency that showed she made it up at the Loudermill hearing. The Union argues that the grievant's failure to include the explanation in

her statement is consistent with the fact that it was not until the Loudermill hearing that the grievant learned that it was AB's hand she was alleged to have hit. Before that, she knew only that she was alleged to have hit AB somewhere. The Union urges that this error by Steiger led to a false conclusion about the grievant's veracity, thus indicating a flawed investigation.

To be fair, a pre-disciplinary investigation should make a good faith effort to gather and consider available relevant evidence. In addition, Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), decided that fundamental due process requires that a public employee be given notice of a proposed discharge and the opportunity to respond. The hearing on December 14 was not held as a predicate to a proposed discharge of the grievant, but it was, as the parties have described it, a Loudermill hearing because it was preliminary to the possible imposition of some discipline, perhaps discharge. In Cross v. Beltrami County, 2001 WL 157038 (Minn.App.), the court stated:

"An assessment of the adequacy of predeprivation procedures depends on the availability of meaningful postdeprivation procedures." Winegar v. Des Moines Comm. School Dist., 20 F3d 895, 901 (8th Cir.1994), . . . The record demonstrates that appellant was given notice and an opportunity to respond to the charges against him, and after his termination he availed himself of a full adversarial evidentiary hearing and was represented at both hearings by private counsel. Therefore, under Loudermill, appellant's due process rights were adequately protected. . . .

In the present case, the grievant had the right to a full evidentiary hearing through the grievance procedure established by the parties' labor agreement, and, in the present proceeding,

she has availed herself of that right. The Employer is required by due process to gather evidence and provide an opportunity to respond, before deciding about discipline. That the Employer's post-investigation determinations of fact and veracity may, arguendo, have been flawed does not indicate a failure of due process. When, as here, a full adversarial evidentiary hearing is available post-discipline, any such allegedly flawed determination can be remedied after the post-discipline hearing, and below, I give substantive consideration to the evidence after such a hearing.

The Primary Issue of Fact. The Union argues that the allegations against the grievant are not proven by substantial evidence. AB and several students testified that the grievant hit AB, and the grievant denies entirely that she did so. The issue is one of credibility, with the burden of proof on the Employer. AB and six other students from the Gudmundson class testified before me. AB testified that she was in the fourth grade on December 5, 2005, that she had poked holes in the styrofoam tray with a pencil, that the grievant hit her right hand when it was next to the tray using her fist, that her hand became red and bruised, that she said nothing at the time, which was about the middle of the class period, that she talked to the Principal after class and then went to lunch, that she did not think the grievant kept her after class that day, that later in the day the Principal asked her to write down what had happened. AB's mother testified that AB got home from school that day about 2:15 p.m., that her hand was red, but not bruised

or injured, that AB told her she had poked a hole in a plate, but did not mean to do that and told her that the teacher put her hand on the table and hit it. The written statement AB gave to Levine that day is short and without much detail. It is generally consistent with her testimony except that she wrote that she only poked one hole in the tray.

AT testified that he was in the fourth grade on December 5, 2005, that he was sitting at the same table as AB, that he saw the grievant hit AB on the hand with a fist after AB was making marks on the tray, but not poking holes in it, that the hand turned red about ten minutes later, that the hand was still red and was swollen at recess. His written statement given to Levine on December 5 is generally consistent with his testimony, except that he wrote that the grievant "slapped" AB's hand. On cross-examination, he testified that his use of "slapped" was just his vocabulary and that the grievant's fist hit AB's hand. Notes made by Levine of AT's account given on December 19 state that he said the hand was red one minute later and that no one said anything.

SB testified that she was in the fifth grade on December 5, 2005, that she was at a different table from the one AB was sitting at, that she could observe AB and the grievant down the length of her table when the grievant said to AB, "don't poke my tray," that the grievant took AB's hand off the tray and hit it with an open hand, not lightly, but "not too hard," that AB was rubbing her hand, that the class continued, that she thought AB poked ten or twelve holes in the tray, that when she asked AB

right after class if she was "okay," AB said "yes," but that AB was sad and that she saw AB's hand after the Art class was over and the hand was red. In the written statement SB gave to Levine on December 5, she wrote that the grievant picked up AB's hand and put the tray under her hand and "slamed her hand" down on the table. SB was asked to write another statement on December 19, and that statement is generally consistent with her testimony and her previous statement, except that SB uses the word "smacked" to describe how the grievant hit AB's hand.

CK testified that she was in the fourth grade on December 5, 2005, that in Art class she was sitting at the table AB was sitting at, that, demonstrating with her fist, she saw the grievant hit AB on the hand after she said "don't poke holes in my tray" and "you take it home with you," that the incident occurred near the beginning of class, that she did not remember how hard the grievant hit AB's hand, that she hit the top of AB's hand, that she did not remember which hand was hit, that the hand was red, but that she did not remember if it was "puffy," that she did not remember if AB was kept after class that day, that she sat with AB at lunch that day as she often does, that "everybody" was talking about the incident at lunch, but she thought not at recess, that she did not think AB hurt her hand at recess, that she did not think she saw a bruise on AB's hand and that the tray had crayons and not paint in it. In the written statement CK gave to Levine on December 5, she wrote that the grievant put the tray down on the table "and [AB] had her hand in the air and [the grievant] took her hand and slammed it down on the tray."

In her notes about the reinterview of CK on December 19, Levine wrote "right next to her when it happened; it was hard & her hand turned red."

TH testified that she was in the Art class on December 5, that she did not see the grievant strike AB, that she saw AB's hand at "lunchtime" and it was red and swollen, that AB said to her that the grievant had slapped her hand, that no one was talking about the incident at lunch or recess. TH did not give a written statement to Levine on December 5, but she did on December 19. In that statement, TH wrote that AB was playing with the tray, that the grievant said she should not play with it, that AB put it down and that the grievant "took her hand and said no don't play with it and hit it with her fist."

YK testified that she was in the fifth grade on December 5, 2005, that she was sitting at the table AB was at in Art class that day, that AB was tapping a tray, but not making holes in it, that AB's hand was on top of the tray, that the grievant grabbed the tray and, while holding it, hit AB's hand, with the tray contacting AB's hand, that AB's hand was "red and puffy right after," that she and AB were scared, and that AB was walking around at lunch and showing her hand to people, saying that the Art Teacher had "slammed" her hand on it hard. In the written statement given to Levine on December 5, YK wrote that AB "was just sitting down then the Art teacher just slamed her hand and gave this plastick plate to her and said, "it yours now." Levine's notes about her reinterview of YK on December 19 state "I saw her hit her hand hard - did not talk about it at recess."

KN testified that he was in the fourth grade on December 5, 2005, that he was at the table next to the one that AB was seated at during Art class that day, that he did not see the grievant hit AB's hand or hear a "thunk," that he saw a dull ring with a little color on AB's hand when going to class after recess, that from the shape of the ring, he thought the grievant might have used either a fist or a flat hand to hit the hand, that AB said she could not really see a mark on the hand at that time, that he sat near AB at lunch but did not observe her hand, and that no one was talking about the incident at lunch. In the written statement KN gave to Levine on December 5, he wrote, "she hite [AB] in the hand with fist or flat hand and she put tray under her hand and she had a red ring around her hand and she came in from [recess] she had a dull ring and I sad that she did."

As I have described above, the grievant has denied that she hit AB throughout the Employer's investigation -- in the oral and written statements she gave Levine and others and in the description she gave at the Loudermill hearing. In the statement she gave Levine on December 5, 2005, she wrote:

. . . Kids were not listening [to instruction in acrylic painting]. I went to [AB's] table and she had poked a hole in paint tray. I said "Now, the paint tray is no good." As to my memory, I did not touch this student. [AB] was very mad at me because I kept her 5 minutes longer than others. She had talked to a student who was in time-out.

At the Loudermill hearing, as I understand her account, the grievant indicated it was possible that AB injured her hand when she threw down the tray in anger as she left the classroom

after being kept back by the grievant. In her testimony before me, she continued to deny that she hit AB.

The weight of the evidence supports a finding that the grievant hit AB on the hand. The Union argues that I should not accept the descriptions of the incident given by the children because those descriptions included variations and conflicts in the details -- for example, that some said the grievant hit AB's hand with her fist while the hand was on the table, some that she hit with her open hand, some that the tray was under AB's hand and some that the tray was between the grievant's hand and AB's hand as the grievant struck AB. The Union also argues that the accounts given by two of the children were not eye witness accounts, but apparent repetitions of what they heard from others.

Even assuming the accuracy of the latter argument, I find that the testimony of the children and their statements given during the investigation are generally consistent and credible, and, based upon that evidence, I find that the grievant struck AB with sufficient force to leave a mark on her hand. Eye witnesses to an event may be inconsistent in describing details yet innocent of fabrication -- because of variations in recollection, variations in opportunity to observe, or, as this case with its child-witnesses may demonstrate, variations in the sufficiency of available vocabulary used first to note the event in memory or used later to describe it. Rote uniformity of description among witnesses may indicate concerted falsification rather than truth.

Rejection of the testimony of the children would require an improbable determination -- that they had fabricated the charge against the grievant, had done so in concert and had done so in the short time between the end of the Art class and their first contact with Gudmundson after recess.

The Discipline. Minnesota Statutes, Section 122A.41, Subd. 4, requires cause for the discharge or demotion of a Teacher who has been employed past the three-year probationary period. The parties' arguments assume that "cause" is also required for discipline less than discharge or demotion. Several provisions of the parties' labor agreement express their joint commitment to "zero tolerance" for violence in the work place.

Minnesota Statutes, Section 626.556, prohibits the "maltreatment" of children. On December 7, 2005, as required by this statute, Levine sent a form informing the Minnesota Department of Education (the "DOE") of the allegations made against the grievant. The Employer presented evidence that on February 6, 2006, after investigation, an Investigator from the DOE determined that the grievant had struck the hand of AB and that such conduct constituted maltreatment as defined by the statute. I have not used that evidence in this proceeding because, as I interpret the grievance procedure adopted by the parties in Article XIV of the labor agreement, issues decided in grievance arbitration are to be decided de novo.

Minnesota Statutes, Section 121A.58, prohibits the "corporal punishment" of pupils by a school district employee, defining "corporal punishment" as "1) hitting or spanking a

person with or without an object; or 2) unreasonable physical force that causes bodily harm or substantial emotional harm."

The Union argues that the long suspension imposed on the grievant was unjust and excessive discipline 1) because it was not consistent with discipline the Employer has imposed in similar cases and 2) because it was based upon an inappropriate justification -- that the grievant lied when she denied the accusation against her and had not shown contrition.

The parties presented evidence describing examples of other discipline recently imposed by the Employer after physical contact between an employee and a student. I give only limited consideration to some of those examples because they have limited relevance here for several reasons -- primarily the following: 1) some examples relate to clerical employees or others not within the Union's bargaining unit, 2) some examples relate to probationary Teachers who have no tenured protection from discipline and discharge and 3) some examples relate to physical contact between Teacher and student that is clearly in the nature of "redirection," i.e., non-violent contact made to direct the student in or away from an intended movement.

The following examples of discipline imposed on tenured Teachers are some of those presented that have greater relevance:

1. On November 13, 2002, TB was suspended for ten days without pay for wrestling with a student in "horseplay." The student was not injured. TB did not deny the conduct during the investigation. He had no previous record of discipline. TB's length of service was not in evidence.
2. On March 3, 2003, SM was suspended for ten days without pay for slapping the hand of an autistic

student. Whether the slap caused the hand to become red was not known by Leiter, who testified about this example. He testified that SM defended the slap as appropriate intervention for an autistic student. SM had prior discipline (written reprimand) for reckless driving in a school parking lot. SM's length of service was not in evidence.

3. On May 26, 2005, RG was suspended for ten days without pay for grasping a student from behind and lifting and dropping the student in order to move into a hallway. The student claimed his ankle was hurt, but he did not receive medical treatment. RG did not deny that he had contact with the student. He had previous discipline (not described) for "moving a pregnant student." The suspension was "settled for less" than ten days, after grievance. RG's length of service was not in evidence.
4. In February of 2007, RG (with no prior discipline and, therefore, presumably not the same RG as the Teacher disciplined in Paragraph 3, above) was discharged, then allowed to resign in lieu of discharge, for "physical and verbal maltreatment of students." Steiger testified that RG shoved a table into two students injuring one of them. RG's length of service was not in evidence.
5. On November 29, 2005, GR was suspended for one day without pay for conduct described as follows in the Notice of Deficiency of that date:

On 11/14/05, you used physical force to get your student's attention. You described the force as a "moderate tap" to the student's forehead. Other testimony indicated that it was more like a "hit" to his forehead. In either case the action was inappropriate and upset the student. The student's parent had him removed from your class.

GR had no prior discipline. GR's length of service was not in evidence.

6. On October 6, 2006, WA was suspended for three days without pay for conduct described as follows in the Notice of Deficiency of that date:

1. Recently, the District received complaints that you had inappropriately placed your hands on some students and pushed them into their chairs when they did not follow appropriate protocol in getting up from their seats. It was also alleged that you were angry and yelled at the students to "sit down!" You were asked if you ever placed your hands on your students. . . . Your response appeared to be evasive.

2. The District has received complaints that you told a student you were "pissed off." When asked if you made this statement, you responded "not to my knowledge. No I don't think so." [The Notice of Deficiency also describes other uncooperative and sarcastic responses given during the investigation and the Loudermill hearing.]

WA had prior discipline not related to physical contact with a student. WA's length of service was not in evidence.

7. On January 19, 2006, CW was suspended without pay from that date until the end of the school year for conduct described as follows in the Notice of Deficiency of that date:

You spanked a first-grade student on the buttocks with a yardstick in front of the student's classmates. The student cried because of your treatment. A number of students stated that the yardstick broke when you spanked this student. You also told your class that the student's mother gave you permission to spank him/her.

You hit another student on the buttocks with a yardstick when the student got out of his/her seat. You denied hitting the student and said you were guiding him/her to get a stuffed animal. However, your claim was not supported. Instead the evidence indicates that you were disciplining him/her for not paying attention.

You hit two other students on their hands as a form of discipline. . . .

You were not truthful in the Loudermill meeting when asked if you ever hit or spanked a student with or without a yardstick, on the buttocks, hands or anywhere else. You denied ever spanking or hitting any student with or without a yardstick. Your actions are even more disturbing because you denied hitting or spanking anyone and therefore refused to be accountable for your misconduct.

CW had no prior record of discipline. CW's length of service was not in evidence.

Steiger participated in the decision about what discipline to impose in the examples given above. In the present case, she testified that the long suspension imposed on the grievant was justified 1) because her striking of AB was

punitive, 2) because AB had been injured, and 3) because the grievant denied the allegations of her misconduct.

For the following reasons, the award reduces the grievant's discipline to a thirty work-day suspension without pay. I agree with the Union's argument that a grievant's denial of allegations of misconduct should not be used as a justification for imposing discipline more severe than what would be appropriate for the misconduct alone. At least for the following reasons, to impose greater discipline because a grievant has denied misconduct is unfair and poor policy. It is unjust to require a Teacher to admit culpability in order to receive a degree of discipline appropriate to the underlying conduct. Decisions about veracity are seldom perfect; what appears to be a sound decision that a grievant's denial is untruthful may be wrong. In such a case, the policy of increasing the penalty for denial of misconduct compounds the injustice to a grievant whose veracity has been misjudged.

Further, such a policy may induce grievants who are falsely accused to admit allegations that are untrue, in order to avoid harsh penalties. I recognize, nevertheless, that it may be appropriate policy to impose a lesser penalty than what is justified by the misconduct alone, if a grievant who has admitted the conduct expresses remorse. Such a policy is qualitatively different, however, from the policy at issue here -- to increase severity because a grievant denies misconduct.

The grievant's act fits the statutory definition of "corporal punishment," but a broad category of acts may fit that

definition -- some of greater and some of lesser culpability. The contrast between the grievant's conduct and that of CW demonstrates the breadth of this culpability. As I view the grievant's conduct, when she hit AB she was under great stress for several reasons -- because the class was not cooperative (and had not been so since she came to Seward in September), because she heard upon her return from sick leave that a boy in the class had made a weapon and threatened her, and because AB was not listening during her instruction.

Of course, these causes for her stress do not justify the grievant's act, but, though her act fits the definition of "corporal punishment," it was a spontaneous punishment, not one based on a forethought that she should punish AB. In contrast, the conduct of CW, as alleged, was far more culpable -- because CW struck the first-grade student several times, did so with apparent forethought, using a yardstick, and did so to embarrass the student before the class; this immediate cause of CW's suspension was not the first example of similar conduct by CW.

The grievant and CW received substantially the same severe discipline -- a suspension from January through the end of the school year. Based on a comparison of these two cases, if the discipline of CW was appropriate, the discipline of the grievant should have been far less severe. The grievant's conduct is more comparable to the conduct of other Teachers whose discipline for physical contact with a student is in evidence, except that the grievant's act, as described above, was a punishment -- though one that was intended spontaneously

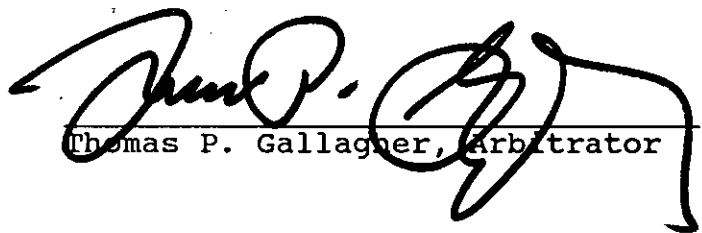
and not pre-meditated. A thirty-day unpaid suspension is appropriate to that act.

The Union asks an award that directs expungement of untrue statements in the Notice of Deficiency. I do not direct such an expungement because the Notice includes statements that may or may not be partly true. Rather, the grievant's personnel record should refer to this Decision and Award, insofar as it modifies the Notice of Deficiency.

AWARD

The grievance is sustained in part. The grievant's suspension is reduced to thirty days work-days without pay. The Employer shall reimburse her for the loss of pay and benefits that she incurred because of the imposition of a longer suspension.

July 10, 2007


Thomas P. Gallagher, Arbitrator